

MAR 17 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JUAN CARLOS RODAS-SANCHEZ,

Defendant - Appellant.

No. 04-50480

D.C. No. CR-03-01228-SVW

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Submitted March 8, 2006**

Before: CANBY, BEEZER and KOZINSKI, Circuit Judges.

Juan Carlos Rodas-Sanchez appeals from the 70-month sentence imposed following his guilty plea conviction for being an illegal alien found in the United States following deportation, in violation of 8 U.S.C. § 1326(a). We have jurisdiction pursuant to 28 U.S.C. § 1291.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appellant contends for the first time on appeal that the district court erred by relying on facts in the presentence report to determine that his criminal history calculation was not overrepresented. We need not reach this issue because, even if appellant is correct, he can not show that any error affected his substantial rights. *See United States v. Adams*, 432 F.3d 1092, 1093-94 (9th Cir. 2006).

Appellant also challenges the district court's denial of his request for a downward departure based on an overstated criminal history calculation. Appellant was sentenced before the Supreme Court issued its decision in *United States v. Booker*, 543 U.S. 220 (2005), and the discretionary denial of a downward departure under the pre-*Booker* mandatory Guidelines is unreviewable. *See United States v. Linn*, 362 F.3d 1261, 1262 (9th Cir. 2004) (per curiam).

In accordance with *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062 (9th Cir. 2000), however, we remand the case to the district court with instructions that it delete from the judgment the incorrect reference to § 1326(b)(2). *See United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000) (remanding sua sponte to delete the reference to § 1326(b)).

AFFIRMED; REMANDED.